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No. 80-689

In the Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, *et al.*, *Petitioners*,

v.

CLARK VINCENT, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion

Brief of the Regents of the University of California As Amicus Curiae

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Motion for Leave To File Amicus Curiae Brief

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Motion for Leave To File Amicus Curiae Brief

The Regents of the University of California respectfully moves this Court for leave to file a brief in this case as *amicus curiae.* The consent of the attorney for the respondents herein has been obtained, but the attorney for the petitioners herein refused to consent to the filing of a brief by The Regents of the University of California as *amicus curiae.*

The applicant, The Regents of the University of California, has an interest in this case in that the reversal by this Court of the decision of the United States Court of Appeals for the Eighth Circuit presumably would have a significant effect upon the manner in which the University of California, and other public universities with similar rules, regulate the use of their facilities with regard to student religious organizations.

By means of this *amicus curiae* brief The Regents of the University of California believes it can assist this Court by informing it of the nature of and the rationale for regulations on facilities use of a major public institution of higher education that do not discriminate against religious expression and activities.

Respectfully submitted,

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INTEREST OF AMICUS

The University of California ("UC") is a state supported university with nine campuses, approximately 130,000 students, and 65,000 full time employees. Under UC policy groups of students and employees may register with an appropriate campus office and reserve certain meeting rooms, auditoriums and other facilities for any lawful purpose when they are not being used for official University purposes and subject to other time, place, and manner regulations. There are now 1,975 such registered campus organizations pursuing a myriad of diverse interests and activities. Approximately 7 percent of these organizations can be characterized as "religious." In common with all other organizations they are free to reserve facilities on a space available basis for lawful purposes including religious activities.

Facilities are generally provided free of charge except when a particular use involves costs over and above routine maintenance. UC policy makes clear that reservation of a facility does not imply UC support, and organizations are prohibited from making any claims of UC support.

We are satisfied that the opinion of the Eighth Circuit Court of Appeals in this matter correctly analyzes the constitutional issues and do not propose to further brief those issues. Indeed, it was largely upon just such a legal analysis, coupled with reasons of policy, that UC developed its current regulations.[1]

This brief seeks to inform the Court of the nature of UC's regulations and their effect of enabling UC to steer a course that is in accord with both the Establishment Clause and the Free Exercise Clause of the First Amendment.

SUMMARY OF ARGUMENT

UC contends that a nondiscriminatory policy permitting all registered campus organizations, including religious organizations, to reserve facilities on a space available basis is at the very least constitutionally permissible, and probably constitutionally required. Such a neutral policy

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1. See Kaplin, W., *The Law of Higher Education*, at 28-29 (1978):

> "It is clear that, under the establishment clause of the First Amendment, public institutions must maintain a neutral stance regarding religious beliefs and activities; they must, in other words, maintain religious neutrality. Public institutions may neither favor or support one religion over another nor favor or support religion over nonreligion . . .
>
> "Neutrality, however, does not necessarily require a public institution to prohibit all religious activity on campus. If a rigidly observed policy of neutrality would discriminate against campus organizations with religious purposes or impinge on an individual's right to 'free exercise' of religion, the institution may be permitted—sometimes required—to allow some religion on campus."

with regard to use of facilities by religious groups assures on the one hand that UC is not approving or disapproving of religious activity, and on the other that it is not unnecessarily burdening the free exercise of religion.

ARGUMENT

I. University Of California Policy.

UC policies with regard to use of facilities provide in pertinent part as follows:

> "All use of University properties and services by campus organizations must conform to applicable time, place, and manner regulations. Those using University properties and services must avoid any unauthorized implication that they are sponsored, endorsed, or favored by the University.
>
> "As a State instrumentality, the University must remain neutral on religious and political matters. The University cannot sponsor or fund religious activities, and cannot sponsor or fund political activities, except when authorized by The Regents or the President or their designees. Religious and political campus organizations shall have access to University properties on the same basis as all other campus organizations, according to guidelines set forth in campus regulations."

Each of the nine campuses of the University of California has developed policies implementing this regulation which make particular facilities available for the use of all registered organizations.

II. Rationale For University Policy.

UC has avoided a rule prohibiting the use of facilities for religious activities because it would require UC to engage in the difficult and burdensome task of determining whether a particular request is or is not for a religious activity. Standards would have to be developed to dis-

tinguish religious from nonreligious activities. All organizations would have to be monitored to assure that even secular organizations are not seeking to engage in religious activities. This would produce the very entanglement that the Establishment Clause is aimed at preventing. And it would do so in a setting where there is little real danger of establishment given the maturity and skepticism of university students. Also, many activities may be on the borderline between religious and nonreligious. If UC should make the wrong choice and classify a nonreligious activity as religious it would risk denying equal protection and First Amendment rights to the organization turned down.

In contrast to the detrimental effects of a policy prohibiting religious activities, UC's policy of neutrality is supportive of associational rights as well as the free exercise of religion and speech by campus organizations. Further, a neutral stance insulates UC from espousing the views of any group and does not advance or inhibit religion any more than access to facilities by political or other special interest organizations advances or inhibits a particular political or social cause.[2] See *Healy* v. *James*, 408 U.S. 169 (1972); *Gay Lib* v. *University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978). Indeed, to single out religious activities would be to discriminatorily inhibit one special class of activities which could result in negative implications about the activities.

Thus, in developing its regulations UC has attempted to refrain from supporting religious activities in a manner that would be in violation of the Establishment Clause as well as avoid a rule that isolates and treats adversely re-

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2. For example, if UC opens up its facilities for the purpose of allowing films to be shown, it must permit a student organization to show *Triumph of Will*, the classic 1933 Nazi propaganda film. But it would not follow that UC is advancing the cause of Nazism.

ligious groups and activities in a manner that would be in violation of the Free Exercise Clause and would also risk violating other constitutional rights.

CONCLUSION

Universities ought to be able to permit the expression of religious ideas, just as they permit the open expression of political and other controversial ideas. Surely, where the only state involvement is the limited use of public facilities on a space available basis, the Constitution cannot be read to prohibit the open exchange of ideas in that forum which has traditionally been held to be the bastion of open expression. There should be no constitutional impediment to a University's maintaining a neutral stance with regard to the content of the expression that takes place in university facilities, subject only to time, place, and manner restrictions.

Although we have grave reservations as to the constitutionality of a regulation such as that of the University of Missouri prohibiting all use of university facilities for religious activities, our purpose is not to seek the invalidation of the University of Missouri policy. Rather, we urge the Court in deciding this case to avoid a disposition that would call into question policies such as those of the University of California which do not discriminate against religious expression or activities in matters of facilities use.

Respectfully submitted,

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